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No. _____

In The Supreme Court of the United States

KEISHA CARTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether the Fourth Circuit erred when it held, in direct conflict with the decisions of nine other circuits, that the use of multiple guns in a single drug conspiracy supports multiple convictions under 18 U.S.C. § 924(c)?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Keisha Carter, respectfully prays this Court grant a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled proceeding on July 30, 2002.

OPINIONS BELOW

The July 30, 2002, panel opinion of the United States Court of Appeals for the Fourth Circuit, reported at 300 F.3d 415 (4th Cir. 2002) is reprinted App. 1.

The verdict entered on October 8, 1998 and the judgment, entered on December 15, 1998, in the Eastern District of North Carolina are reprinted at App. 69 and App. 40.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fourth Circuit in this action issued on July 30, 2002. The jurisdiction of this Court to review the judgment of that Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves an interpretation of 18 U.S.C. § 924(c)(1). The provision of this Statute is set out in the Appendix hereto at App. 56.

STATEMENT OF THE CASE

A. THE FACTS

Keisha Carter was indicted in a five-defendant, 38 count indictment on three counts: conspiracy to distribute and possess with intent to distribute crack cocaine and other controlled substances, in violation of 21 U.S.C. § 846 and two violations of 18 U.S.C. §§ 924(c) and 2 for use or carrying of a firearm during and in relation to a drug trafficking crime, and aiding and abiding the same.

At trial, a total of twenty-seven witnesses testified for the Government, but only eight provided any testimony against Carter. Although the Government's case provided evidence spanning ten years of events, the only evidence against Keisha Carter focuses on the events of one day, June 20, 1997. The sum and substance of the entire case against Keisha Carter, taken in a light most favorable to the Government, shows that in the early morning hours of June 20, 1997, a group of individuals, including George Tyrell Gibbs (a.k.a. Scottie Davis, "Rat"), Keisha Carter's boyfriend, picked up defendant in a blue Chevrolet Blazer at her home. Fourth Circuit J.A. at 804, 865-66. Gibbs, DeMario Hopkins, Dwayne Melvin and Kenneth Davis were present in the Blazer. Id. Prior to calling Keisha, this group had contemplated a robbery for money and drugs. Id. at 511. According to each of the men present in the Blazer, all of whom testified for the Government after striking plea agreements, the men possessed several weapons including a handgun, assault rifle, and a "street

sweeper" shotgun. Id. at 867. According to the men, when the issue of a target for the robbery was raised in the Blazer, Keisha suggested another drug dealer, Eric Carter, as a possible target. Id. at 512. Ostensibly, after at least one phone call and one visit to the residence, Keisha was able to get Eric Carter to open the door to his home. Id. at 512-14. According to Eric Carter, Keisha said she was "sorry", and backed away allowing Gibbs, Hopkins and Davis, each carrying a weapon, to enter the residence. Id. at 667. The men then obtained approximately one quarter pound of marijuana and some cash during the robbery and fled. At no time did Keisha Carter possess any weapon or enter the Eric Carter house.

Following that robbery, the group headed to Clinton, North Carolina, where they stayed in a motel. Id. at 807-08. Two rooms were obtained. Gibbs and the defendant slept in one room; Hopkins, Melvin and Kenneth Davis in the other. Id. at 984. For several hours early that morning, a potential bank robbery in Garland, North Carolina was discussed between the men; however, all testified Keisha Carter was not present during those conversations. Id. at 632, 869, 984. The next morning, the group departed Clinton and drove to a trailer in rural Sampson County which was the residence of Kenneth Davis' girlfriend. At the trailer, the group was joined by three other men: Edward Ward, Perry Moore and someone named "Bill." At this point, the men continued their discussion of the bank robbery and Keisha Carter was assigned the role to drive the Blazer and the "get-

away" vehicle. Id. at 633. According to the Government's case, Keisha Carter was present for these final discussions on the porch at the trailer. Id. at 984.

Later that day, Carter drove the Blazer and was accompanied by Gibbs and Melvin. They remained parked in a spot one half mile from the Garland Bank. Id. at 611-12. The other five, Ward, Hopkins, Davis, Moore and "Bill" approached the bank in a Nissan Sentra. Two of the five men went into the bank with a handgun and an assault rifle. However, after a premature discovery of the group's possession of weapons by onlookers, and the ensuing chaos that resulted, the group did not complete the robbery and fled the bank. Id. at 808-09, 985-86. The two vehicles rendezvoused a short time later, and Ward, Hopkins and Davis got into the Blazer. They also shoved the guns they had used in the attempted robbery into the back of the Blazer. As the group left the area, Keisha Carter suggested they go to Charlotte, North Carolina, because she knew some individuals in that city. Id. at 831.

From this evidence, Petitioner was convicted on the two § 924(c) counts and a mistrial was declared on the conspiracy count. Defendant received a mandatory sentence of twenty-five years imprisonment.

B. PROCEEDINGS IN THE COURTS BELOW

Keisha Carter was sentenced to consecutive prison terms of five and twenty years based upon her convictions for two violation of 18 U.S.C. § 924(c)(1), which makes it a federal crime to use or carry a firearm

during or in relation to a drug trafficking crime. Both counts of conviction were based on the same predicate drug trafficking crime: to wit, conspiracy to distribute and possess with intent to distribute crack cocaine and other controlled substances in the Eastern District of North Carolina. Following the conclusion of evidence, petitioner was convicted on the two § 924(c) counts, but the jury was unable to reach a verdict and a mistrial was declared on the conspiracy count.

On appeal, Petitioner challenged, intra alia, the fact that she may not be sentenced to multiple terms for two § 924(c) offenses that arose from a single predicate drug trafficking offense. In a per curiam opinion the Fourth Circuit found that although "[a] number of other circuits have adopted the position the defendant now urges on the Fourth Circuit...we have already reached the issue and decided it in a manner contrary to defendant's position. See United States v. Camps, 32 F.3d 102, 106 (4th Cir. 1994) cert. denied, 513 U.S. 1158 (1995)." 300 F.3d 415 at 9 (4th Cir. 2002).

This issue in this case, simply put, is whether each § 924(c)(1) count must be supported by a separate predicate offense. Nine of the ten other circuits that have decided this issue have reached a decision in direct conflict with the Fourth Circuit's prior opinion in Camps, supra, and in this case. For the reasons which follow, and now with the benefit of multiple scholarly opinions from most of the other circuits in the Nation, this Court should undertake an a review of this most important issue affecting the fair and equitable administration of criminal justice in the Fourth Circuit and the United States.

REASON FOR GRANTING THE WRIT

I. The Fourth Circuit's holding that a District Court may impose consecutive sentences for two § 924(c)(1) violations based on the same underlying predicate offense, conspiracy to distribute, cocaine and possession with intent to distribute is in direct conflict with every other circuit in the Nation, fundamentally misinterprets the language of § 924(c) and undermines the uniformity in administration of justice on gun counts that the statute was designed to achieve.

18 U.S.C. § 924(c)(1) states, in relevant part:

> Whoever, during and in relation to any crime of violence or drug trafficking crime...uses or carries a firearm, shall, in addition to the punishment provided for such crime violence or drug trafficking crime be sentenced to imprisonment for five years.... In the case of his second or subsequent conviction under this subsection, such persons shall be sentenced to imprisonment for twenty years.... (Emphasis added.)

The critical question, which has divided the circuits, is the meaning of the phrase "whoever, during and in relation to any crime of violence or drug trafficking crime...uses or carries a firearm." The language of this section can be interpreted in one of two ways: (1) each time a defendant uses or carries a

firearm in relation to a crime, he commits a separate crime; or (2) if, during the course of a predicate crime, a defendant uses or carries a firearm at any time, he commits a separate crime. United States v. Anderson, 59 F.3d 1323, 1326 (en banc)(D.C. Cir. 1995). This former meaning opines the interpretive focus should be on the verb "uses" and not on the phrases "during and in relation to" or "crime of violence or drug trafficking crime." Id. This reading of § 924(c)(1) was adopted by the Fourth Circuit in Camps, supra. This view essentially holds that each separate deployment of a gun during and in relation to a drug crime is a new violation of the section. Thus, under this theory, whenever the defendant employs, brandishes or displays a gun during the commission of a predicate crime, he violates § 924(c)(1) as many times as he uses or carries the gun. Only the Eighth Circuit has joined the Fourth Circuit in so holding. See e.g., United States v. Freisinger, 936 F.2d 383 (8th Cir. 1991); United States v. Ortis-Martinez, 1 F.3d 662 (8th Cir.), cert. denied, 510 U.S. 936 (1993).

The latter meaning, however, instead articulates that the allowable unit of prosecution under § 924(c)(1) is the drug trafficking crime and not the individual firearms. That is, it does not matter how many times a single gun is "used" or "carried" during the commission of a drug trafficking crime nor how many guns are used during the relevant period because the statute contemplates only one § 924(c)(1) conviction for each event or series of events that constitutes one crime. In that regard, defendant can be charged with multiple underlying drug trafficking crimes, but if she only charged with one predicate for the § 924(c)(1)

violation, then only one § 924(c)(1) conviction may occur. In other words, once the jury determines a defendant has committed the underlying crime, it asked a binary question--whether defendant has or has not used a gun during and in relation to the crime. The answer to that question is either "yes" or "no", but it can not be "yes, yes."

Accordingly, under this second theory, each § 924(c) count needs to be tied to a different "crime of violence or drug trafficking crime." All but one of the courts of appeal have now addressed this question and nine of them have come down on petitioner's side, holding that the use of multiple guns in a single drug conspiracy will not support multiple convictions under § 924(c). See, e.g. United States v. Pena-Lora, 225 F.3d 17 (1st Cir. 2000); United States v. Lindsay, 985 F.2d 666, 674 (2d Cir.) cert. denied, 510 U.S. 832 (1993); United States v. Privette, 947 F.2d 1259, 1262-63 (5th Cir. 1991), cert. denied, 503 U.S. 912 (1992); United States v. Taylor, 13 F.3d 986, 992-94 (6th Cir. 1994); United States v. Cappas, 29 F.3d 1187, 1188-89 (7th Cir. 1994); United States v. Fontanilla, 849 F.2d 1257 (9th Cir. 1988); United States v. Smith, 924 F.2d. 889, 894-95 (9th Cir. 1991) United States v. Henning, 906 F.2d 1392, 1398-99 (10th Cir. 1990); cert. denied, 498 U.S. 1069 (1991); United States v. Rogers, 921 F. 2d 1089, 1092-93 (10th Cir. 1990), cert. denied, 501 U.S. 1211 (1991); United States v. Parra, 2 F.3d 1058, 1070-71 (10th Cir.) cert. denied, 510 U.S. 1026 (1993); United States v.

Hamilton, 953 F.2d 1444 (11th Cir.), cert. denied, 506 U.S. 871 (1992); United States v. Anderson, 59 F.3d 1326(en banc)(D.C. Cir. 1995).[1]

The problem with Freisinger, supra, and its progeny is its main premise - - that the word "firearm" is the "object" of the § 924(c)(1) offense. The word "firearm" is not the subject of § 924(c) to which the statute's unit of prosecution is linked. § 924(c) clearly focuses on firearms only to the extent a defendant uses or carries them "during and in relation to" crimes of violence or drug trafficking crimes. United States v. Taylor, 13 F.3d at 993. "The statute emphasizes the relationship between the firearms and the underlying drug-trafficking crime, rather than the individual firearms themselves . . . ." United States v. Lindsay, 985 F.2d at 673. Indeed, Congress has enacted a host of other statutes addressing firearms in other contexts. The purpose of § 924(c)(1) is to target defendants who choose to involve weapons in an underlying trafficking crime or crime of violence. The predicate offense, which is commission of the drug trafficking crime, not the firearm, is the object of the compound criminal statute set forth in § 924(c)(1). United States v. Taylor, 13 F.3d at 993-94.

Furthermore, the minority position would be stronger if the statute employed "use" as a noun, such that "a use" of a gun in relation to a drug crime would violate the statute. However, it appears that the draftsmen were not employing the word "use" to imply that each discrete act might be a separate "use"

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[1] Thus, only the 3d Circuit appears not to have definitively ruled on this issue.

and crime. United States v. Anderson, 59 F.3d at 1326-27. The statute's pairing of "uses" with "carries" strongly suggests Congress did not seek to criminalize every discrete deployment of a gun during an extended period when a drug crime, particularly a conspiracy, was being committed. "'Carries' does not easily lend itself to a meaning that suggests a discrete act; rather, it implies a continuing activity." Id. at 1327. Yet, since Congress did not intend a § 924(c) violation to occur on each of potentially dozens or hundreds of occasions that a defendant "carries" a gun during an ongoing drug trafficking crime, particularly a conspiracy, it follows that Congress would not have intended each deployment in the same context to be a separate "use." Id. Furthermore, if Congress had contemplated such a scheme, Congress could easily have written the words "each time" or "on each occasion" in the section to make that meaning clear. It did not. The most logical explanation of the precise language chosen for § 924(c)(1) is that Congress simply did not foresee the ambiguity which the statute has created.

In addition, § 924(c)(1) provides for very serious penalties for repeat violations. Under the Camps, supra analysis, if a defendant carries a gun three or four times during one underlying drug crime or crime of violence, it would as a practical matter, ensure a life sentence. "If Congress had intended that result, we would of course honor the choice; but we think that if Congress has wished the statute to operate in that fashion, it would have used the language making it obvious." Anderson, 59 F.3d at 1328.

Furthermore, the underlying drug offense or crime of violence is already made a federal crime under other sections of the Federal Code. If § 924(c)(1) was merely a penalty enhancement these cases would not arise at all. "But it is surely not illogical for Congress to make § 924(c)(1) a distinct crime tied to a predicate crime, and yet to treat it as a course of conduct or state of being armed. The result is that the government need not convict of--but it must prove--the predicate crime (which is why § 924(c)(1) has a hybrid character)." Id. at 1331 (emphasis in original).

Even though either interpretation of § 924(c)(1) may be plausible, the best that can be said for the statute is it is ambiguous and, under those circumstances, the Rule of Lenity dictates acceptance of the majority position. United States v. Anderson, 59 F.3d at 1333; United States v. Lindsay, 985 F.2d at 676; United States v. Coiro, 922 F.2d 1008, 1015 (2d Cir.) cert. denied 501 U.S. 1217 (1991); United States v. Chalan, 812 F.2d 1302, 1317 (10th Cir. 1987), cert. denied, 488 U.S. 983 (1988).

Finally, critical as well, is the government's repeated concession before a number of circuit courts (or at least lack of any argument to the contrary) that the use of more than one gun will not support multiple counts under § 924(c)(1) for the use of a firearm during a single drug trafficking crime. See, e.g., United States v. Pena-Lora, 225 F.3d at 32; United States v. Cappas, 29 F.3d at 1189; United States v. Privette, 947 F.2d at 1262.

CONCLUSION

§ 924(c)(1) provides that a defendant must use a firearm "during and in relation to" a drug-trafficking crime, thus requiring "some relation and connection between the firearm and the underlying crime." United States v. Feliz-Cordero, 859 F.2d 250, 254 (2d Cir. 1988). Accordingly, the statute emphasizes the relationship between the firearms and the underlying drug-trafficking crime, rather than the individual firearms themselves. United States v. Lindsay, 985 F.2d at 678. The statutory language thus provides some indication Congress did not intend a separate violation for each firearm. Id. To hold otherwise would mean that every time a defendant held, brandished or referred to a gun during the course of committing a drug trafficking offense, he would be indulging in a separate "impulse" and thus guilty of committing a separate § 924(c)(1) violation. In many conspiracies lasting a lengthy period of time, the same gun may be employed dozens of times and, thus under the Camps, supra rationale, with each separate "use of the gun" defined as a separate violation, it would not be unusual for the Government to obtain, as a practical matter, a life sentence whenever a gun accompanies a drug crime. To so hold exposes defendants to enhanced penalties Congress never contemplated.

If Congress had intended to impose such draconian penalties by requiring a defendant be convicted and consecutively sentenced for every time a defendant displays or fondles a gun in relation to the same drug trafficking conviction, surely it would have said so in clear language. It did not.

Accordingly, the only conclusion that can be drawn from the legislative language and sparse history, as well as through the Rule of Lenity, is "that Congress considered the appropriate unit of prosecution to be the underlying drug-trafficking offense, not the separate firearms. Only where the defendant commits multiple drug-trafficking crimes or violent crimes, and the government can link the firearms to those crimes...may the government prosecute for multiple violations of § 924(c)(1). Where the government links multiple firearms to a single crime, only one § 924(c)(1) violates occurs." United States v. Lindsay, 985 F.2d at 674.

Ten other federal circuits have now considered this question and all but one have ruled contrary to the Fourth Circuit's early opinion on this issue in Camps, supra which controlled disposition of the case at bar. It is now time for this Court to dispositively decide this question in light of the eloquent articulation and elucidation of the issue as it has percolated through nearly all of the other circuits. This is particularly so where the Government has conceded Petitioner's position before a number of other circuits, but refuses to do so in the Fourth Circuit.

Accordingly, Petitioner respectfully requests a Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit issue to review the decision below.

RESPECTFULLY SUBMITTED, this 28th day of October, 2002.

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